Tentative Rulings for February 7, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG00206 ***Humphreys v. Briscoe*** **(Dept. 402)**

12CECG03394 ***City of Fresno v. La Jolla Loans, Inc. et al.*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

08CECG01425 ***Diocese of San Joaguin v. Schofield*** **is continued to Thursday, March 7, 2013 at 3:30 p.m. in Dept. 402.**

10CECG03520 ***Hamilton v. Yates et al.*** **is continued to Thursday, March 7, 2013, at 3:30 p.m. in Dept. 403.**

09CECG04725 ***Jones v. Nuttall*** **is continued to Thursday, February 21, 2013 at 3:30 p.m. in Dept. 501.**

12CECG00608 ***Arevalo v. MERS, et al.*** **is continued to Thursday, February 14, 2013, at 3:30 p.m. in Dept. 501.**

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(19)

Tentative Ruling

Re: ***Pacific Service Credit Union v Hernandez***
Superior Court Case No. 06CECG03625

Hearing Date: February 7 (**Dept. 402**)

Motion: By parties for preliminary approval of class action settlement

Tentative Ruling:

To deny, without prejudice. To set April 13, 2013 at 3:30 p.m. as the hearing date for an Order to Show Cause why current class representatives should not be removed as such.

Explanation:

1. Case History

The class was certified on August 19, 2010. This is the class definition: "All California consumers who received from PSCU a Notice of Intent and who PSCU claims owe a deficiency as the result of PSCU's sale of the consumers' repossessed vehicle, during the period beginning four years before the filing of the complaint, excluding those consumers who reinstated their contracts or redeemed their vehicles." A declaration filed by Jill Evans on January 10, 2011 certified that all such persons were provided with notice of this pending case and that they were members of the class. There were but four opt-outs.

There was a decertification motion heard in July, 2011, based on new authority set forth in *Fireside Bank Cases* (2010) 187 Cal. App. 4th 1120. That case held that there could not be a class-wide determination of the validity of default judgments taken against persons who allegedly received improper Notices of Intent under the same law at issue here, the Rees-Levering Act. Pacific Service Credit Union ("Pacific") urged that class members who had suffered such judgments were not proper members of the class.

However, in *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, the Supreme Court found that a practice of filing lawsuits against consumers in distant counties so as to disadvantage their ability to defend could constitute an unfair business practice. The Court found that this would not permit final judgments to be set aside, but that it would permit injunctive relief to halt such a pernicious business practice, pursuant to Business & Professions Code section 17200 et seq. and Civil Code section 3369.

The fact that some class members could be entitled to restitution, while others would be limited to injunctive relief, is of no consequence to certification. "Differences in individual class member's proof of damages is not fatal to class certification." *Wershba v. Apple Computer, Inc*. (2001) 91 Cal. App. 4th 224, 238. "The requirement of community of interest does not depend upon an identical recovery . . ." *Vasquez v. Superior Court* (1971) 4 Cal.3d 800; 810-811.

After being ordered to do so by the Court, Pacific filed dozens of related case notices for persons who were class members being pursued by Pacific in separate cases, in violation of the agreement with class counsel (see Krieg Declaration, paragraph 1, filed June 21, 2011). One pending matter is the Court's Order to Show Cause why Pacific should not be sanctioned for failing to file the related case notices in a timely fashion.

The hearings on those matters have been continued by various stipulations of the parties to April 13, 2013.

2. The Proposed Settlement Omits Certain Class Members

The proposed settlement uses the above definition of the class, with one addition. It seeks to exclude class members who were the subject of a judgment obtained by Pacific prior to June 18, 2010. Class members falling in that category are also to be denied any notice of the settlement.

The named class representatives have consented to being removed as such and are excluded from the settlement class definition, but are still provided with tens of thousands of dollars by the settlement. See paragraphs 25, and 37c. But those similarly situated to current class representatives, who also have judgments against them dated prior to June 18, 2010, are to receive nothing.

The consent forms filed by current class representatives to withdrawal of themselves as class representatives do not state whether or not they are aware of the payments. Declarations from each such person need be filed on or before March 5, 2013 discussing their state of knowledge.

There is no explanation of what is to become of the claims of the class members excluded from the settlement. They might well object to the settlement, were they given notice of it.

This Court is unaware of authority for settling the claims of some class members while ignoring the claims of other class members, even to the extent of omitting excluded class members from notice of the proceedings. The Court is concerned that a conflict may exist between class counsel along with the named class members and the excluded class members. It certainly is not possible to find that the settlement is fair, reasonable, and adequate for such persons when they are not discussed. Being denied notice and an opportunity to be heard is a violation of their due process rights.

3. Other Problems with the Settlement.

Same appears to include a second opt-out process, when such process has already been completed. There is no basis given to justify the 50% lower payments to those receiving a NOI after August 1, 2007, no particular differences between the prior notices and these notices is pointed out, and no authority is discussed.

A factual basis for such difference is required. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116; *Clark v. American Residential Services* (2009) 175 Cal. App. 4th 785, 803.

Similarly, there is no basis given for valuing the claims of named class representatives as worth tens of thousands of dollars while providing no settlement for those similarly situated, i.e., those who also suffered judgments in violation of an agreement with class counsel prior to June 18, 2010. The proposed judgment contends that the settlement is a "final adjudication of the class action" without mention of the class members not included in the settlement or the fact that their claims are not released. There can be no final judgment where claims remain.

Paragraph 54 provides a release of the parties and their counsel, as well as the class administrator, for failure to make payments as provided for by the settlement. Same also provides that the Court will review any disputes, which is not a true settlement. The Court will not approve a release of claims related to the settlement or potential malpractice claims, nor will it place itself as a referee after final judgment for any dispute other than enforcement of the settlement.

Paragraph 63 provides for release of claims mere "related" to claims in this lawsuit. Such is overbroad; released claims must have the same factual basis as those set forth in the complaint. "The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate . . . *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700; *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

The attempt to bar use of the agreement as evidence is improper, as found in paragraph 68. The law already sets forth limits on use of compromises as evidence, and private agreements purporting to create privileges are invalid. *Baker v. General Motors Corp* (1998) 522 U.S. 222; Evidence Code section 911. This problem appears with the end of paragraph 79. The paragraph "Your Rights – Exclusion" in the proposed notice is an improper second opt-out procedure. Same was already completed in 2010.

Finally, the Court notes that it did not consider Exhibit 2 to the Krieg Declaration, which states it is a confidential mediator's proposal, pursuant to Evidence Code sections 1119 – 1121.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 2/6/13.
(Judge's initials) (Date)

(18) **Tentative Ruling**

Re: ***Doris J. Laubacher, et al. v. Bryant L. Jolley, et. al.***
Case no. 12CECG01085

Hearing Date: **February 7, 2013 (Dept. 402)**

Motions: By defendants, demurrer to the first amended complaint (FAC)

Tentative Ruling:

To overrule the demurrer pursuant to California Code of Civil Procedure (CCP) section 430.10(e).

Explanation:

Causes of action for negligent misdelivery of money held in escrow, breach of fiduciary duty, and breach of oral contract

Defendants contend that none of the conditions precedent were satisfied. The FAC alleges that the conditions precedent were satisfied. (See FAC, page 3, lines 26-28; page 4, lines 1-2 and lines 26-27; page 6 lines 9-10 and 16-17; and page 7, lines 11-12 and 15-16.) In determining whether an assignment has been made, the court may go outside the terms of the instrument and may find an assignment from the conduct of the parties. (*California Pac. Title Co., Sacramento Division v. Moore* (1964) 229 Cal.App.2d 114, 117.) No matter how unlikely or untrue defendants may find the allegations, the allegations must be accepted as true for purposes of ruling on a demurrer. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.)

Also, the court's ruling on the demurrer to the complaint stated, in relevant part: "For purposes of a demurrer, the existence of the contract is judicially noticeable, but the proper interpretation of clauses in the contract is not subject to judicial notice when those matters are reasonably disputable. (*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 248 Cal.App.4th 97, 113.)" Notwithstanding this ruling, defendants again advance arguments that ask the court to interpret certain provisions of the subject buy-sell agreement.

Judicial estoppel and admissions

Plaintiffs correctly contend that judicial estoppel cannot apply due to the settlement of the previous employment action. Where a court cannot determine the basis of a settlement from the pleadings, a settlement will not be the basis for judicial estoppel. (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 850.) Also, judicial estoppel is usually limited to cases where a party misrepresents or conceals material facts. (*California Amplifier, Inc., supra,* 94 Cal.App.4th at 118.) It should be invoked only in egregious cases. (*Ibid.*) The allegations at issue here are not egregious,

and they do not involve a misrepresentation or concealment of material facts. To support their position that the doctrine of judicial admissions bars part of the FAC, defendant rely on precedent that is inapplicable in a demurrer context because it applies to summary judgment and prohibiting plaintiffs from attempting to create a triable issue of material fact through declarations that contradict the factual allegations in an operative pleading.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 2/6/13.
(Judge's initials) (Date)

[10]

Tentative Ruling

Re: ***Vartanian v. Vartanian***
Superior Court Case No. 10CECG03180

Hearing Date: **Thurs., Feb. 7, 2013 (Dept. 402)**

Motion: Defendant Hagop Vartanian's
Demurrer to the First Amended Complaint

Tentative Ruling:

To OVERRULE the Demurrer for the reasons set forth below.

Defendant shall have 10 calendar days' leave within which to file his Answer or responsive pleading. Time shall run from the clerk's service of the minute order.

Analysis:

The court grants Defendant's request to take judicial notice of the transcript of the 10/29/10 hearing in this matter. The court takes judicial notice of what was said at the hearing, but does not necessarily accept the truth of any matters asserted therein.

A. Four Agreements Invalid (1st – 10th causes of action)

To OVERRULE the Demurrer on this ground.

First, Defendant Hagop Vartanian demurs to the first through tenth causes of action on the ground that the Agreement of Sale, Installment Note, Security Agreement, and Allonge are unenforceable against him. Defendant argues that Sona signed and drafted those agreements pursuant to a power of attorney. Defendant asserts that because she engaged in self-dealing, those contracts are void as against public policy.

The problem with this argument is that the court cannot simply assume that the contracts were invalid, that Sona was engaging in self-dealing, that Sona was abusing the power of attorney, or that Sona breached her fiduciary duty. Those are mixed questions of law and fact that must be resolved either by considering evidence on a motion for summary judgment or at trial.

At the pleading stage, when ruling on a Demurrer, the court must accept the allegations of the First Amended Complaint as true, no matter how unlikely or improbable, because the sole question for the court is whether the facts, as alleged, plead a cause of action. (**Del E. Webb Corp. v. Structural Materials Co.** (1981) 123 Cal.App.3d 593, 604.)

Defendant cites the Power of Attorney as documentary evidence that Sona has breached her fiduciary duties to Hagop. But on a Demurrer, the court may not consider evidence. The court may consider only the facts alleged on the face of the pleadings. The court may also take judicial notice of additional facts, but only where those facts are not reasonably subject to dispute. (**Evid. Code 452, 453**.)

Defendant must prove that the contracts are illegal by presenting evidence on a motion for summary judgment or at trial. He cannot merely assert this at the Demurrer stage.

B. 7th Cause of Action for Wrongful Eviction -- Uncertainty

To OVERRULE the Demurrer on this ground.

Second, Defendant demurs to the seventh cause of action for wrongful eviction on the ground that it is UNCERTAIN because plaintiff has failed to set forth facts to show the terms of the lease. The Complaint at paragraph 77 merely alleges that "PMC had an oral lease with Defendant for $3,000 per month in rent."

But Defendant fails to recite the elements of a claim for wrongful eviction and fails to specify how the allegations are defective. Defendant fails to specify how the allegations are uncertain and what additional facts would be needed to state a claim. The FAC puts Defendant on notice that he is being sued for wrongfully evicting plaintiffs from premises which PMC rented for $3,000 per month. And the FAC provides a legal description of the property in question. Defendant may elicit any additional information regarding the alleged oral lease through discovery.

Defendant cites no case law or statutory authority to prove that the claim is defectively pled.

C. 7th Cause of Action -- Failure to State a Claim

To OVERRULE the Demurrer on this ground.

Third, Defendant demurs to the seventh cause of action for wrongful eviction on the ground that it fails to state a claim. But Defendant fails to carry his burden to specify precisely how the claim is defective.

Pursuant to CRC Rule 3.1312(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 2/6/13.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Western v. Save Mart Supermarkets***
Superior Court Case No. 10CECG02169

Hearing Date: February 7, 2013 (Dept. 402)

Motion: Plaintiff's Motion for Cost of Proof Sanctions [C.C.P. § 2033.420]
Plaintiff's Motion to Tax Costs
Defendant's Motion to Tax Costs

Tentative Ruling:

To grant the motion for cost of proof sanctions and award $300 for one hour of counsel's time at trial; to grant the defendant's motion to tax plaintiff's costs in the total amount of $19,925.22; to grant the plaintiff's motion to tax defendant's costs in the amount of $13,747.47.

Explanation:

Motion for Cost of Proof Sanctions:

Code of Civil Procedure section 2033.420 provides, in relevant part:

> If a party fails to admit … the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves … the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(Code Civ. Proc. § 2033.420, subd. (a).)

The court *shall* make such an order unless it finds one of the following:

1) An objection to the request was sustained or a response to it was waived under Section 2033.290;

2) The admission sought was of no substantial importance;

3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter;

4) There was other good reason for the failure to admit.

(Code Civ. Proc. § 2033.420, subd. (b).)

Whether a party is entitled to costs of proof under section 2033.420, and, if so, the amount to be awarded is within the trial court's discretion. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508.) In determining whether a party reasonably denied the truth of a requested admission, "there are a variety of factors which a court should consider." (*Brooks v. American Broadcasting Co., supra*, 179 Cal.App.3d at p. 509.) These include whether a responding party later learned facts that would have called for an admission and advised the requesting party that the denial was in error or should be modified, and "whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." (*Id*. at pp. 510-511.) "[I]t is [not] enough for the party making the denial to 'hotly contest' the issue. [Instead], there must be some reasonable basis for contesting the issue in question before sanctions can be avoided." (*Id*. at p. 511.) In assessing the reasonableness of a party's refusal to admit, the court must consider the responding party's knowledge at the time of the request. (*Wimberly v. Derby Cycle Corp*. (1997) 56 Cal.App.4th 618, 637-638.)

> " 'The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. [Citation.] The basis for imposing sanctions … is directly related to that purpose. Unlike other discovery sanctions, an award of expenses … is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission … [citations] such that trial would have been expedited or shortened if the request had been admitted.' [Citations.]"

(*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865.)

Facts at Issue in the Requests

Request for Admission No. 2:

This Request merely calls for an admission that a hole existed in the parking lot somewhere near a cart return.

The boilerplate objections are without merit. The request is not vague, ambiguous, overbroad, burdensome, without reasonable limitation on scope or irrelevant. Nothing in the request requires any admission that the hole (or holes) had anything to do with plaintiff's fall. It should have been admitted, particularly in light of the fact that on October 12, 2010, seven months before defendant responded to the Request for Admission, defendant had already "describe[d] the hole in the area of the parking lot which is the subject of this litigation" as "approximately 6 in. by 6 in. and approximately ¾ - 1 in. deep." (See Ex. B to Sample Decl. Special Interog. No. 15, p. 9.) Accordingly, plaintiff is entitled of the cost of proving the existence of a hole at or near the cart return in defendant's parking lot.

Request for Admission No. 3:

This Request actually asks for admission of four things: that on December 7, 2009, plaintiff fell, that she fell in a hole, that she fell in a hole near a cart return, and that the fall occurred in defendant's parking lot. That plaintiff "fell in a hole" is can suggest that plaintiff fell because of the hole as well that the geography in which plaintiff fell

contained a hole. Liability for negligence is a three-step analysis. A plaintiff must prove: (1) a legal duty to use due care; (2) a breach of that duty; and (3) the breach as the proximate or legal cause of the resulting injury. (6 Witkin, Summary of California Law (10th Ed.) "Torts" § 835.)

Plaintiff contends that defendant could not deny this Request in good faith because its response to Special Interrogatory No. 15 (discussed above) conceded the existence of a hole. Actually, the response to Special Interrogatory No. 15 states, minus its objections, "[t]he area of the parking lot in which plaintiff alleges she fell contains a depression in the parking lot which is approximately 6 in. by 6in. and approximately ¾ -- 1 in. deep." The interrogatory does not concede that plaintiff actually fell because of the hole.

The witness statements that plaintiff cites as proof that defendant should have admitted this request do not preclude defendant's denial either. Neither Jesse Perez, nor Enrique Rodriguez saw plaintiff fall. Rodriguez saw plaintiff on the ground between her car and the cart return near a deeper depression. Perez was told by plaintiff and a witness that plaintiff "fell in a hole."

Defendant could have harbored a good faith belief that plaintiff did not "fall in a hole," i.e. fall *because of the hole* due to the rainy conditions, plaintiff's awkward footwear, and plaintiff's inattention. The Court will not award cost of proof sanctions for proving that plaintiff fell, that she fell in a hole, that she fell in a hole near a cart return, and that the fall occurred in defendant's parking lot or that the fall occurred because of the hole.

Request for Admission No. 4:

This Request is compound. It asks defendant to admit both that its employees knew about the existence of the hole where plaintiff allegedly fell and that that the hole caused her to fall there.

Because the Request explicitly asked Save Mart to admit causation, which it had a good faith belief of facts justifying denial (see above), the Request could be denied.

Plaintiff contends that because Save Mart's employee Enrique Rodriguez testified in deposition that he was aware of the hole for several years, defendant could not deny the request. However, Rodriquez did not see plaintiff fall. He expressed no opinion on how plaintiff fell and was merely testifying as to the origin of the hole that was near plaintiff when she was found. The court will not award cost of proof sanctions for establishing the length of time that the hole existed or that defendant knew or should have known about the hole.

Request for Admission No. 5:

This Request asks for two admissions: 1) that the hole constituted an unsafe condition and 2) that it caused plaintiff to fall. Thus, for the reasons set forth with respect to Request 4, defendant could properly deny it, because it contested causation in good faith.

Request for Admission No. 8:

This Request does not link the hole to plaintiff's fall. Indeed it does not identify any particular hole in the parking lot.

The Request is a trifle ambiguous as to what hole was filled. However, given that the discovery is clearly about a particular hole, the one where plaintiff alleges she tripped, defendant should have assumed the request related to that hole and stated the assumption in the response. (*Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 428; *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.)

The Request should have been admitted. It does not call for an admission of liability or causation. Form interrogatory 17.1 served with the Request states: "[f]ollowing the subject incident, Save Mart filled the imperfection in the parking lot that is alleged to be involved in this matter." (Sample Decl. Ex. P.)

The court will award cost of proof sanctions for this request.

Amount:

Plaintiff argues that all pre-trial and trial costs relating to the proof of "liability" are recoverable. This is simply not correct.

Only those expenses incurred in *actually proving* the matter are recoverable pursuant to section 2033.420. (§ 2033.420, subd. (a); see also *Wagy v. Brown* (1994) 24 Cal.App.4th 1.) '"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.' [Citation.] Given this definition, preparation for trial or arbitration is not the equivalent of proving the truth of a matter so as to authorize an award of attorney fees under [former] section 2033, subdivision (o). Expenses are recoverable only where the party requesting the admission 'proves . . . the truth of that matter,' not where that party merely prepares to do so. Plaintiff is not entitled to attorney fees under the statute and the trial court erred in awarding them." (*Id*. at p. 6; accord *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 737 [trial court's awarding all of a party's litigation costs from the date of service of party's requests for admissions "was far more than reasonable compensation under the circumstances"]; see also *Stull v. Sparrow*, supra, 92 Cal.App.4th pp. 865-866 ["Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved."].)

Given that Save Mart should have admitted that there was a hole in its parking lot in which plaintiff contended that she fell and that they filled it after her accident, plaintiff is entitled to the cost of proving these facts at trial. This would have taken no more than 30 minutes on each subject, and therefore the sum of $300.00 will be awarded.

Motion to Tax Costs

The "very essence" of section 998 is its encouragement of settlement. (*Scott Co. v. Blount, Inc., supra*, 20 Cal.4th 1103, 1114; *Mangano v. Verity, Inc*. (2008) 167

Cal.App.4th 944, 950.) Thus, "to encourage both the making and the acceptance of reasonable settlement offers, a losing defendant whose settlement offer exceeds the judgment is treated for purposes of postoffer costs as if it were the prevailing party." (*Scott Co. v. Blount, Inc*., *supra*, 20 Cal.4th at p. 1114.)

Both Plaintiff and defendant have filed memorandums or costs and both have filed Motions to Tax Costs. Plaintiff claims that defendant is 1) not entitled to costs because it made only a token offer which was not made in good faith; and 2) at best, defendant is only entitled to costs incident to its second Code of Civil Procedure section 998 offer to compromise, made January 11, 2012, and is not entitled to costs incurred before that date. She also challenges several of the costs as excessive. Defendant seeks to tax all costs incurred after service of its first section 998 offer to compromise, and also challenges several specific costs as unrecoverable in any event. Thus, before costs can be awarded, this court must decide the effect of a second 998 offer on a first offer, and then decide whether the relevant section 998 offer was made in good faith.

Effect of Successive 998 Offers

Code of Civil Procedure section 998 is silent as to the effect of a later section 998 offer on an earlier offer. However, every currently published case that has considered the issue has held that a second 998 offer extinguishes the first. (See *Wilson v. Wal–Mart Stores, Inc*. (1999) 72 Cal.App.4th 382, 388, 391; *Distefano v. Hall* (1968) 263 Cal .App.2d 380, 384-385; *Palmer v. Schindler Elevator Corp*. (2003) 108 Cal.App.4th 154, 157-158; also *Ray v. Goodman* (2006) 142 Cal.App.4th 83, 89-91; *One Star, Inc. v. Staar Surgical Co*. (2009) 179 Cal.App.4th 1082, 1095-1096.)

Defendant relies on the reasoning of *Martinez v. Brownco Const. Co., Inc*. (2012) 203 Cal.App.4th 507 (*Martinez*), a case depublished by virtue of the California Supreme Court's grant of review on May 9, 2012. It is not citable as precedent, nor can we adopt its reasoning.

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) "Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state." (*Ibid*.) Stare decisis "has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." (*Ibid*.) As all published authority is unanimous that a later section 998 offer extinguishes the first we are bound to follow that rule.

A second section 998 offer extinguishes the first. Assuming the second $300,000 offer was properly made, defendant can recover costs made after the time of that offer and plaintiff can recover her costs up to the time of that offer.

Good Faith of the Offer

"The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case....' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.)

Whether the offer is reasonable "depends upon the information available to the parties as of the date the offer was served." (*Westamercia Bank v. MBG Industries, Inc*. (2007) 158 Cal.App.4th 109, 130.) Reasonableness generally "is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant," and "[i]f an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable." (*Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699, italics and fn. omitted.)

First Test:

The offer easily passes the first test. Even by plaintiff's accounting, the offer exceeded her economic damages. Moreover, "Where ... the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998." (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 117 (*Santantonio*).) In *Santantonio*, the court held that a defendant's section 998 offer for $100,000 was prima facie reasonable in light of the fact that the defendant had secured a verdict of no liability at trial, despite the fact that the plaintiff sought to recover $900,000 in damages. (*Id*. at pp. 117–118.)

Second Test:

"If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant's information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Elrod v. Oregon Cummins Diesel, Inc*., *supra*, 195 Cal.App.3d at p. 699.)

Plaintiff argues that the $300,000 offer was a "token offer." She claims that at the time the January 2012 settlement offer was made, liability was not seriously contested ["Discovery had no revealed any evidence contrary to liability"]. (Sample Decl. ¶ 6.) This is based on written discovery from Save Mart admitting the depression was ¾ to 1 inch in depth, and an employee deposition indicating he knew about the depression. Thus plaintiff felt she could establish knowledge of the hazardous condition and

sufficient time to repair it. The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205.) Plaintiff forgets that causation and damages were highly contested. (See for example plaintiff's counsel's chart at page 3 of her Declaration where she admits that she had defendant's contentions regarding: plaintiff's contribution to her own injuries, the medical overbilling, plaintiff's own lack of effort to find substitute employment, that the move to Oklahoma had nothing to do with the accident, tend that plaintiff was at fault for not watching where she was going and not wearing safe footwear.) Also the offer was made at the conclusion of a second mediation at which the parties' theories of liability were addressed.

In January 2012, plaintiff's medical specials were "undisputed" as being close to $60,000 in Kaiser charges. (Sample Decl. ¶ 7.) With regard to lost wages, plaintiff had an "undisputed salary of $5,598.96 per month and had been out on state disability for a year after the accident. Although defense expert Dr. Huene has opined a typical recovery was only 4 months for this sort of surgery, plaintiff's counsel claims he never said plaintiff should only have been out four months. Besides, plaintiff would have already have lost her job by then and vocational job experts would agree to a 6-9 month job search. "Therefore the conceded amount of lost wages (4 months form the accident until plaintiff was terminated from her job and 9 months on her subsequent job search) was at least $78,255.70." (Sample Decl. ¶ 7.) Counsel also had "reliable" expert testimony plaintiff needed an immediate decompression surgery, and had not yet been told of Dr. Huene opinion that the surgery was not related to the injury. (*Ibid*.) The surgery would cost $20,000 and future lost wages for the post-surgical recovery would be $22,000. (*Ibid*.) Plaintiff did not yet know that Dr. Huene believed the surgery should only cost $8,000 with a shorted recovery time, Plaintiff's expert also claimed that plaintiff would need a shoulder replacement surgery which would cost $50,000. (*Ibid*.) Thus, plaintiff's counsel though she had economic damages of about $230,000. (Sample Decl. ¶ 8.) She expected pain and suffering to be a multiple of the economic damages. (*Ibid*.) Thus the $301,000 was not reasonable.

The defense offer of $300,000 was not a token offer and was not made in bad faith. It was in excess of plaintiff's economic damages. It was in excess of the jury's verdict. It accounted for the disputed causation, damages and comparative fault.

Moreover, cases finding offer "token offers" and/or made in bad faith are far lower. (See *Pineda v. Los Angeles Turf Club, Inc*. (1980) 112 Cal.App.3d 53 [$2,500 offer]; *Wear v. Calderon*, *supra*, 121 Cal.App.3d 818 [$1]; *Culbertson v. R.D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704 [$5,000]; *Elrod v. Oregon Cummins Diesel, Inc*., supra, 195 Cal.App.3d 692 [$15,001].) However, nearly every published case since *Elrod* has rejected the contention that a defendant's section 998 offer was not "reasonable" within the meaning of Elrod and has permitted a discretionary fee award to the defendant. (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 116-118 [defense offer of $100,000 per plaintiff; discretionary award of expert witness fees]; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1264 [defense offer of cost waiver only; discretionary award of expert witness fees]; *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1270-1274 [defense offer of $2 million; discretionary award of expert witness fees]; *Carver v. Chevron U.S.A., Inc*. (2002)

97 Cal.App.4th 132, 152-155 [defense offer of $100 per plaintiff; discretionary award of expert witness fees]; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 338-339 [defense offer of $300,000; trial court abused discretion in disallowing discretionary award of expert witness fees]; see also *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1526-1529 [$100 defense offer; discretionary award of attorney's fees under section 1021.1].)

Defendant's Motion to Tax Plaintiff's Costs:

A. Motion to Tax — Generally

Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5, subd. (c)(4).) All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).)

On a motion to tax costs, the initial burden depends on the nature of the costs that are being challenged. "If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (*Ladas v. Calif. State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) "The court's first determination, therefore, is whether the statute expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to show them to be unnecessary or unreasonable." (*Ibid.*) In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.)

B. Specific Costs

Filing Fees:

All the plaintiff's filing fees were incurred before the January 11, 2012 offer; accordingly none of the costs will be taxed.

Jury Fees:

All of the jury fees were incurred after the last section 998 offer, thus the total amount of $842.78 will be taxed.

Deposition Costs:

Costs itemized as 4.j through 4.t will be taxed in the amount of $6,753.52. Costs itemized as 4.ff through 4.ii (the Compex or records costs) will be taxed in the amount of $176.12.

Defendant argues the Compex or records costs are not recoverable in their entirety as photocopying costs. Plaintiff argues she should be able to recover all of them because they were reasonably necessary to the conduct of the litigation as they

related to her medical and employment records. The cost of subpoenaing records is recoverable the taking of necessary depositions under section 1033.5, subdivision (a)(3). Records only subpoenas accomplish the same thing as subpoenas seeking the appearance of the custodian of records at less expense. However, due to the defendant's section 998 offer, plaintiff's entitlement to costs is cut off after January 11, 2012. Exhibit B to the Declaration of Renee Turner Sample in Opposition to the Motion indicates that costs claimed as items 4.u through 4.ee were incurred prior to January 11, 2012.

Service of Process:

The costs for all trial subpoenas will be taxed, for a total of $475.00.

Ordinary Witness Fees:

All the ordinary witness fees were incurred after defendant's section 998 offer. All will be taxed, the amount of $364.04.

Models, Blow-ups, and Photocopies of Exhibits:

All of these costs were incurred after the date of the defendant's 998 offer. All will be taxed in the amount of $6,626.43.

Court Reporter Fees:

All of the court reporter's fees were incurred after the date of the defendant's 998 offer. All will be taxed in the amount of $2,902.50.

"Other"

First, all costs incurred after the defendant's 998 offer will be taxed. Here, this is only the January 11, 2012 mediation, a cost of $525.00.

The court will allow the cost of the unsuccessful mediation on April 13, 2011. The court in *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202 awarded fees for court-ordered mediation. This court's Standing Order No. 07-0628 requires the parties to engage in some form of ADR, thus the court will award the fees for the mediation. The court will not award fees for the plaintiff's travel from out of state to attend the mediations and MSC. Local residents do not their costs reimbursed; plaintiff will not either. Accordingly, $1,259.83 in travel expenses will be taxed.

Plaintiff's Motion to Tax Costs:

Deposition Costs:

For the reasons set forth above, defendant's entitlement to costs started on January 11, 2012. Accordingly, the costs associated with the depositions incurred between May 3, 2011 (Eva Longoria) and January 5, 2012 (Dr. Rick Sarkisian) will be taxed in the amount of $3,723.50.

Expert Witness Fees

Behr v. Richmond (2011) 193 Cal.App.4th 517 (Behr)

First, plaintiff argues that Behr held that the failure to attach a copy of a written section 998 offer precludes an award of expert fees under section 998. It is difficult to determine what the *Behr* court held. It is unclear whether there was a written 998 offer at all in *Behr* or merely a failure to attach the offer to the Memorandum of costs. Where, as here, both parties agree that there was a written section 998 offer to compromise on January 11, 2012 in the amount of $301,000, and that offer has been produced in Opposition, this court will not deny expert costs to defendant merely because the 998 offer was not originally attached to the memorandum of costs.

Non-Testifying Experts

Second, plaintiff claims that costs for experts who did not testify should be excluded. This is not required under existing law.

Section 998 provides that a trial court "has the discretion whether to make an award of expert witness fees...." (*Skistimas v. Old World Owners Ass'n* (2005) 127 Cal.App.4th 948, 953.) Specifically, subdivision (c)(1) of that section (hereafter section 998(c)(1)) provides (with an exception not relevant here) that when a plaintiff "in any action" rejects a defendant's section 998 offer to compromise and fails to obtain a more favorable judgment, the trial court "*in its discretion*, may require the plaintiff to pay *a reasonable sum* to cover costs of the services of expert witnesses, who are not regular employees of any party, *actually incurred and reasonably necessary in either, or both, preparation for trial* or arbitration, *or during trial* or arbitration, of the case by the defendant." (Italics added.)

In *Evers v. Cornelson* (1984) 163 Cal.App.3d 310 (*Evers*), the defendant contended on appeal that the trial court improperly allowed the fees of an orthopedic surgeon under section 998 because the surgeon did not testify at trial. (*Id*. at p. 317.) The Fifth District Court of Appeal rejected that contention, stating that "so long as the expert is a potential witness," reasonable costs were recoverable "so long as the expert at least aided in the preparation of the case for trial." (*Ibid*.) Cases after *Evers* confirm that recovery of expert witness fees under section 998 is not limited to the actual time consumed in examination in court. (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 123-124; *Michelson v. Camp* (1999) 72 Cal.App.4th 955, 975-976.)

None of the expert witness fees will be excluded simply because they did *not* testify in court.

Not Potential Witnesses

Plaintiff next argues that the expert witness fees of Vavoulis, Weiner & McNulty; Balian & Associates; and Brad Avrit should be excluded because they were *unlikely* to testify. In this, plaintiff seeks to take advantage of the *Evers* exception from compensation for witnesses who are not even "potential experts."

Here, none of the objected to experts were unable to testify as experts, as was the case in *Evers*, and plaintiff has not met her burden in persuading the court that they did not assist defendant in preparing for trial. First, the fees for Vavoulis, Weiner & McNulty were reasonably incurred. The parties did not stipulate to use plaintiff's economic experts until "[a]pproximately one month before trial," [Sample Decl. ¶10] thus it was

reasonable and appropriate for defendant to have its own economists work up the case. Second, Avrit of Wexco International was disclosed as an expert civil engineer to testify on "human factor issues." Because causation and comparative fault were hotly contested, it would be helpful for defendants to have an expert in this area to establish that the fall was to some greater or lesser degree plaintiff's own fault. Third, Balian was designated as a retail operations consultant to testify as to standards of care for commercial property, even if he did not testify at trial; it would be conceivably helpful for defendant to have an expert on that subject. Finally, the fact that Balian and Avrit based their testimony on the assumption that the depression was less than ¼ inch deep is not a basis to deny fees. Each party is entitled to present such a view of the facts as they chose. Moreover, an expert may be asked hypothetical questions and as such his or her utility is not ended if an assumption changes.

Not Reasonably Necessary

Plaintiff argues that the charges for Balian and Avrit/Wexco International were not "reasonably necessary" for the trial presentation and preparation because "liability" was never seriously contested. As set forth previously herein, liability has a causation component, and Avrit at least was highly material to causation. Moreover, plaintiff has not demonstrated that an expert on the standard of care for retail shopping establishments would not be "reasonably necessary" during the litigation since her conclusion that they were not reasonably necessary is based on her characterization on the facts, not defendant's characterization of the facts and experts may testify as to their opinions regarding many fact patterns.

Excessive Charges

Plaintiff contends that the $30,350.00 charges by Dr. Huene are excessive. Dr. Huene is an orthopedic surgeon who was designed to testify about the plaintiff's injuries and the reasonableness, necessity, and costs of past, present and future medical treatment. However, plaintiff claims that in addition to these topics, Dr. Huene "devoted a significant amount of time developing his opinions about the standard of care plaintiff received at the emergency room to identify and treat her injuries" and claims he testified at length" about this at his deposition. These statements are unfounded. Plaintiff's counsel cannot know what Dr. Huene did or thought in preparing his testimony. His bills show that he spent time reviewing copious medical records and deposition transcripts, examining plaintiff, preparing a report, and attending trial for a day. The allegedly unsupported and unfounded portions of his testimony take up only 7 of 118 pages of his deposition testimony, which is less than ten percent, and is not significant. Plaintiff has not demonstrated that the charges by Dr. Huene are excessive, either by reference to his rate, $500, or by the time spent in preparing the case.

Plaintiff next asserts that the charges for Dr. Koobatian of Vocational Designs are excessive. Defense seeks to recover $31,287.10 in fees for Dr. Koobatian's work as a rehabilitation counselor. Plaintiff claims his work had no value because it was based on Dr. Huene's faulty assumption that plaintiff should have been released back to work 3 to 4 months after her initial surgery without limitations. This would have put plaintiff back to work before her FMLA ran out and would have kept her from losing her job. Plaintiff claims Dr. Huene's opinion was inaccurate as plaintiff was not able to return to work at that time. First, given the jury's low award of damages, it is most probable that it was

persuaded by Dr. Koobatian's testimony, thus the court cannot say that it was not "reasonably necessary." Second, every party is entitled to present its own view of the facts to the jury. Expert's opinions are a notorious source of contention at trial. Plaintiff has not demonstrated that Dr. Koobatian's charges are excessive either by rate or by hours spent, only that she finds his opinion faulty.

Next, plaintiff takes exception to the $13,946.25 in charges from Wexco International and Brad Avrit because the work performed by the was based on their inaccurate assumption that the hole plaintiff fell in was only ¼ inches deep. In fact, Avrit testified a hole ¾ to 1 inch deep would have been a potential hazard. Again, plaintiff does not contest that the hourly rates at Wexco International are excessive or the time spent was excessive, she simply does not like the opinion reached, and claims it would have been inadmissible at trial as unfounded.

The work by Wexco International was helpful in preparing for trial as, demonstrated by plaintiff because Avrit developed opinions as to the potential trip hazard of the hole based on varying depths, he could then advise defendant as to possible outcomes. While he might have independently concluded the hole was less than ¼ inch, he certainly was available to advise defendant on plaintiff's expert's contentions throughout the case. The work done by Wexco International was "reasonably necessary" and because no particular portion is identified as "excessive," none will be taxed.

Finally, plaintiff objects to the expert costs of $101,101.31, as proving that the settlement offer of $301,000 was unreasonable because if it was reasonable to incur such costs the settlement offer was unreasonably low. Again, a $301,000 offer is not a "no-risk" offer. It proved more generous than the final judgment.

Models, Blowups and Photocopies of Exhibits

Plaintiff objects to the costs associated with Kathleen Close, the private investigator who took still and video surveillance of plaintiff. Defendant explains that the majority of the cost claimed ($5,834.89 of the $10,023.97) relate to reimbursing Ms. Close for her time, travel, meals and lodging for her trip to Fresno for trial to authenticate the still photographs taken from her video footage, and requests this portion of the claimed costs. Defendant presents no authority that Category 13 on the Memorandum of Costs encompasses the cost of a witness to authenticate exhibits.

It does not. Code of Civil Procedure section 1033.5, subdivision (a)(13) indicates the cost of "[m]odels and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact." Nowhere does it suggest the cost of either creating the exhibit might be reimbursed or the cost of authenticating the exhibit might be reimbursed. And in this case since the exhibits were authenticated through the plaintiff herself, Ms. Close's testimony was not reasonably helpful to aid the trier of fact. (See *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1559–1560 [costs for exhibits not used at trial not permitted]; *Ladas v. California State Automobile Association* (1993) 19 Cal.App.4th 761, 775 [trial court erred in awarding costs for trial exhibits, blowups and transparencies excluded at trial]; *Great*

Western Bank v. Converse Consultants, Inc. (1997) 58 Cal.App.4th 609, 615 [case settled; exhibits not "reasonably helpful to aid the trier of fact"].)

The entire cost associated with Ms. Close, $10,023.97, will be taxed.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 2/6/13.
(Judge's initials) (Date)

Tentative Rulings for Department 501

[10]

Tentative Ruling

Re: **Pearson v. Ramos**
Superior Court Case No. 11CECG04022

Hearing Date: Thurs., Feb. 7, 2013 (**Dept. 501**)

Motion: Plaintiff's Motion to "Void the Judgments to Dismiss"

Tentative Ruling:

To DENY WITHOUT PREJUDICE, for the reasons set forth below.

Given the complexities involved, the court advises Plaintiff to seek counsel to represent him in prosecuting this matter.

Analysis:

First, Plaintiff's notice of motion and motion are defective because they fail to cite any cognizable legal basis for the relief sought. So it is difficult for the court to determine what relief Plaintiff is seeking and what laws and procedures to apply. In this regard, a self-represented litigant must be held to the same standard as a practicing attorney. (**Rappleyea v. Campbell** (1994) 8 Cal.4th 975, 985.)

Second, Plaintiff asserts that this court should declare the 7/12/12 dismissal void because the court lacked jurisdiction to act. But Plaintiff cites no applicable case law or statutory authority in support of this proposition. This court finds that the court did have jurisdiction to dismiss the action without prejudice because Plaintiff failed to appear at the 7/12/12 OSC hearing and because Plaintiff failed to pay the transfer fees or show that he was entitled to a waiver of those fees. (**CCP 399**.)

Third, on 5/24/12, the court ordered Plaintiff to appear at an OSC re: dismissal for 7/12/12. Plaintiff fails to explain why he failed to appear by court call on 7/12/12.

Fourth, assuming Plaintiff is asking the court to set aside the dismissal, he fails to explain why the court should set aside the dismissal. On 3/14/12, this court granted Defendant Ramos's motion to transfer venue to San Bernardino County. Under CCP 399, the burden was on Plaintiff to pay the transfer costs and fees, $50 to the Fresno Court as a transmittal fee and $435 to the San Bernardino Court for their filing fee.

Since Plaintiff has filed a request for initial fee waiver with the Fresno Court, Plaintiff is entitled to a fee waiver for the $50 transmittal fee. (**CRC 3.55 (4)**.) But Plaintiff cites no authority that the Fresno Court may grant a waiver of a sister court's filing fee.

The burden is on Plaintiff to make arrangements with the San Bernardino Court to obtain a waiver of its filing fee.

In his motion, Plaintiff makes no showing of why he failed to appear by court call on 7/12/12 and he makes no showing that he has arranged for a fee waiver with the San Bernardino Court. Once again, as a self-represented litigant, Plaintiff is held to the same standard as a practicing attorney. (**Rappleyea v. Campbell** (1994) 8 Cal.4th 975, 985.)

Pursuant to CRC 3.1312(a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 2/6/2013.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Flores et al. v. Proffitt et al.***
Superior Court Case No. 11CECG01659

Hearing Date: February 7, 2013 **(Dept. 501)**

Petition: Compromise Claim of Minor Danica Cruz

Tentative Ruling:

To deny without prejudice.

Explanation:

California Rules of Court Rule 7.950 states:

> A petition for court approval of a compromise of or a covenant not to sue or enforce judgment on a minor's disputed claim; a compromise or settlement of a pending action or proceeding to which a minor or person with a disability is a party; or disposition of the proceeds of a judgment for a minor or person with a disability under chapter 4 of part 8 of division 4 of the Probate Code (commencing with section 3600) or Code of Civil Procedure section 372 must be verified by the petitioner and **must contain a full disclosure of all information that has any bearing upon the reasonableness of the compromise, covenant, settlement, or disposition.** Except as provided in rule 7.950.5, the petition must be prepared on a fully completed *Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With a Disability* (form MC-350)

At present, the Petition does not fully comply. First, the Petition indicates that the minor is completely recovered. See ¶ 9. A. But, there are no current medical reports or a letter from her pediatrician in support of this statement. The last report included with the Petition involves a follow up of the minor at the age of 6 months. This was almost 3 years ago. Although it does appear that the only injuries suffered were pre-mature birth, there must be proof that she has completely recovered.

Second, it is questionable whether the structure of the annuity is reasonable. Only $5000 will be paid to the minor at the age of 18. If she wanted to attend college, she would only have $5000 at her disposal. In addition, the minor will only attain a "good chunk" of the settlement at age 30. While she will obtain a total payout of $42,600, the Court must consider whether this disposition is in the best interests of the minor. See Probate Code §§ 3602, 3610 and 3611. See also *Christensen v. Superior Court* (1987) 193 Cal.App.3d 139.

Finally, no proposed order was submitted. See Mandatory Judicial Council Form MC-351. As a result, the Petition will be denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 2/6/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(20) **Tentative Ruling**

Re: ***Music v. Community Regional Medical Center et al.***
Superior Court Case No. 11CECG01597

Hearing Date: **February 7, 2013 (Dept. 503)**

Motion: Motion to compel discovery responses from plaintiff

Tentative Ruling:

To grant. Code Civ. Proc. §§ 2030.290, 2031.300, 425.11(b). Within 10 days, plaintiff Paula Music shall serve responses to the Form Interrogatories, Special Interrogatories, Request for Production of Documents, and a Statement of Damages, without objection, and shall produce all documents responsive to the requests for production. All objections are waived.

To impose monetary sanctions in the amount of $600 in favor of moving parties Mikail Alper, PA-C, Naeem Akhtar, M.D., and Ambreen Khurshid, M.D., and against plaintiff Paula Music (Code Civ. Proc. §§ 2023.10(d); 2023.030(a)), to be paid to moving parties' counsel within 30 days of service of the minute order by the clerk.

Explanation:

The discovery at issue was served on 9/24/12. Plaintiff has not served any responses. See Paloutzian Dec. Accordingly, an order compelling plaintiff to provide responses without objections (Code Civ. Proc. § 2030.290(a), 2031.300(a), 425.11(b)) is warranted, and reasonable sanctions must be imposed (Code Civ. Proc. §§ 2023.010(d), 2023.030(a); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404).

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 2/5/2013.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Molley v. City of Kingsburg***
Case No. 12CECG03024

Hearing Date: February 7th, 2013 (Dept. 503)

Motion: Defendant City of Kingsburg's Demurrer to Complaint

Tentative Ruling:

To take the demurrer off calendar, as a first amended complaint has been filed. Therefore, the demurrer is moot. (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 2/5/2013.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Kaweah Container, Inc. v. Jet Plastica Industries, Inc.***
Superior Court Case No.: 12CECG01081

Hearing Date: February 7, 2013 (**Dept. 503, please note department change from Dept. 403 for this hearing only**)

Motion: By Cross Defendant Kaweah Container, Inc., to strike portion of cross complaint of MCG Capital Corporation

Tentative Ruling:

To grant, striking the phrase "…including reasonable attorney's fees to the extent permitted by law" in paragraph 4 of prayer of the cross complaint. (Code Civ. Proc., § 1021.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 2/6/2013.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***Avetis Terpogozyan v. Comcast Corporation and Sherrell L. Grayson***
Court Case No. 10CECG03374

Hearing Date: **February 7, 2013 (Dept. 503)**

Motion: Defendant Comcast's Motion for Summary Judgment, or in the alternative, for Summary Adjudication against Plaintiff

Tentative Ruling:

To deny the motion in its entirety.

To overrule all of the evidentiary objections.

Explanation:

Evidentiary Objections:

Defendant Comcast's objections are not actual objections to evidence, but instead object to the form of both objecting parties' responses on the Separate Statement. Thus, they are not evidentiary objections, but are instead merely argument, and the court has considered it as such.

Comcast's further argues that plaintiff's responses to the Separate Statement are ambiguous simply because he used the terms "agree" and "disagree" rather than indicating that he "disputes" or "does not dispute" a fact. However, this argument is not well taken. Even though plaintiff has not strictly followed the rules, it is clear from the context of the responses that he is using "agree" and "disagree" as the equivalent of "undisputed" and "disputed," respectively. The court will not exalt form over substance, especially where Comcast's own arguments in Reply illustrate that it was well able to understand the sense of Plaintiff's responses.

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New evidence presented on Reply:

Comcast presented a copious amount of new evidence in its Reply, and also filed a "Reply Separate Statement." The summary judgment statute does *not* provide for a "Reply Separate Statement." Nor are "Exhibits and Evidence in Support of Reply" generally allowed. [*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252] This is because this implicates due process considerations, since the opposing party has had no opportunity to respond to this evidence. [*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316] The court has discretion to consider the evidence, but not without giving the other party an opportunity to respond. [*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362] The only factor arguing in favor of

considering this new evidence, at least to some extent, is that both opposing parties relied on the deposition testimony of Mr. Landy, which Comcast was clearly unable to address in its motion since the deposition occurred the day after the motion was filed. Thus, the first opportunity it had to do so was on Reply. The court has taken this into consideration, and has given due consideration to the impact this evidence might have on rendering Mr. Landy's testimony facially incredible (as Comcast argues). To that extent only, the new evidence has been considered. Since the court rules in favor of the opposing parties, this does not prejudice them. The new evidence pertaining to industry standards, however, is not considered, since this is evidence Comcast could have presented on its motion, but did not.

Analysis:

First, Comcast failed to adequately establish the industry standard for inspection of in-ground vaults such as the one at issue. Mr. Miller's declaration shows he is familiar with Comcast's procedures and the standard Comcast uses in dealing with its utility vaults like the one at issue. But he does not evidence any familiarity with the standards used by other companies. The only reference to other companies besides Comcast is vague (he serves as advisor to "companies" on the design and management…." See p.1:23). Furthermore, he makes no reference (at least, in his first declaration) to the relevant law (statutes and regulations) that govern the industry, and how these shape the relevant industry standard. The fact that he goes into this detail in a supplemental declaration filed with the Reply brief is beside the point. Defendant did not meet this burden on the motion itself. Mr. Miller's statement as to industry standard is conclusory.

An expert declaration must contain *facts* showing the expert's qualifications (competency) to express the opinion in question. This requires him/her to recite facts showing he/she has the training, experience or necessary skill to render an opinion on the particular matters in controversy. [*Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379, 387—no showing that expert was qualified to express opinion as to cause of the patient's neurological problem] More important here, there must be a factual basis for the opinion expressed. [*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523] Typically, on summary judgment courts are more stringent on requiring the moving party's expert declaration to meet this standard, and may be willing to accept a lesser foundational showing with opposing expert declarations. This is consistent with the requirement to strictly scrutinize the moving party's evidence, while liberally construing the opposition's evidence. [*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768]

The fact that neither plaintiff nor Ms. Sharpe submitted their own expert declarations does not change this analysis. Had Comcast's expert's declaration sufficiently established the standard of care in the industry, then the opposing parties could only refute that opinion by producing expert declarations to the contrary. [*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487] But here, where Comcast's expert declaration presents a conclusory statement about the industry standard for the inspection of utility vaults, the opposing parties did not have to supply their own expert declarations merely to argue that the industry standard was not adequately established.

And not addressed by the moving party is the fact that compliance with the industry standard is not necessarily conclusive of reasonable conduct in a given case. [*See Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America* (2001) 90 Cal.App.4th 1151—(applied to the insurance industry) "Simply put, as a mother might say to her child, just because other insurers do it, does not necessarily make it right." See also *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407—(applied to automobile manufacturer's liability) "compliance with industry standards does not always insulate a manufacturer from negligence liability."]

All parties agree that premises liability requires that the owner have notice, whether actual or constructive, of the defective or dangerous condition and a reasonable opportunity to repair. [*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200] In *Ortega,* the court found that constructive notice could be demonstrated by producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the owner had constructive notice of the hazard, and that one way of showing constructive notice was by proving that the site had not been inspected within a reasonable time. [*Id.* at 1211] Here, however, defendant arguably seeks to prevent plaintiff from even having the issue of constructive notice on the table, by arguing that the industry standard establishes that Comcast had no duty at all to inspect until and unless it had *actual* notice of a problem at the site. Thus, the question as to whether or not this industry standard (even if established) is conclusive of reasonable conduct is an important one, and is not adequately addressed on this motion.

Beyond this, even if the industry standard had been as argued by Comcast, and even if it was conclusive of reasonable conduct by Comcast, plaintiff has supplied evidence that creates a triable issue of material fact as to whether or not Comcast had actual notice. The testimony of Mr. Landy is not facially incredible just because he is a "buddy" of plaintiff's. In the case *Estate of Housley* (1997) 56 Cal.App.4th 342, relied upon by Comcast, the testimony in question was that of a son testifying as to what his father had promised him about his inheritance. Clearly, the witness in question there was more than a mere "buddy," and was far more personally interested in the outcome of the litigation than Mr. Landy is. And yet, the court found that his testimony was <u>not</u> facially incredible as a matter of law just because of that, even if there were aspects of his testimony that lacked in some important details, such as the date or dates the oral promises were made. [*Id.* at 360]

Comcast's new evidence about its records (which Comcast states shows that no Comcast technician had a service call at or near Mr. Landy's home around the time frame he says he spoke with the technician), does not render Mr. Landy's testimony facially incredible. Comcast asks the court to find it "more likely than not" that Comcast's records are more accurate than Mr. Landy's memory. However, on summary judgment a witness' testimony is generally accepted as true, and the court does not resolve issues of credibility. "If a party is otherwise entitled to summary judgment ... (it) shall not be denied on grounds of credibility." [CCP § 437c(e) (parentheses added); *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064] If the jury believed Mr. Landy's testimony, it might also believe that Comcast's records were erroneous. This is not facially incredible; it is an issue of fact to be weighed by the jury.

The mere fact that Mr. Landy did not "materialize" as a witness until a couple of years after the accident does not make the testimony facially incredible. Likewise, the fact that Mr. Landy testified that he did not know what the repairman did after their conversation does not make the testimony facially incredible. Mr. Landy testified that he told the repairman about the problem, the repairman said, "We'll take care of it," and Mr. Landy left it at that. Matters going to the weight of the evidence must be disregarded in ruling on a motion for summary judgment. [*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38]

Finally as to the new evidence about what the gardeners did to try to repair/replace the lid to the vault, this evidence does nothing to make Mr. Landy's testimony either more or less facially credible. This new evidence merely establishes that Comcast did not repair its equipment, and the *gardeners* (mere volunteers) made a failed attempt (apparently several failed attempts) at putting the broken lid back on. There is nothing suggesting that the gardener's efforts were (or even could have been) sufficient to *effectively* repair the vault. Comcast cannot argue on the one hand that a repairman from a different company (i.e., who they suppose in one argument was who Mr. Landy actually talked to that day) would have been unable to repair/replace the lid, but these gardeners somehow had the right skill and equipment in order to do the job effectively to restore it to its former condition. Thus, the "grocer/spilled milk" analogy used by Comcast does not appear to properly outline the facts. Arguably, the vault after the gardeners failed attempts at repair is not analogized to a *different* "spilled milk carton" (at least, the jury might not view it that way). It could easily be viewed as (i.e., analogized to) the *same* spilled milk carton that a customer (a volunteer) had tried to clean up, but some of the mess remained (or the leaking milk carton was left out on the floor to leak some more). Furthermore, the property owner's duty to put and maintain premises in a reasonably safe condition is nondelegable, so whatever the gardeners did or didn't do might be found to be beside the point. [*Knell v. Morris* (1952) 39 Cal.2d 450.] A jury might still find the "grocer" (i.e., Comcast) negligent in that scenario.

Plaintiff has established that there is a triable issue of material fact as to whether Comcast had notice of the faulty utility vault. The motion for summary judgment and summary adjudication must be denied.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 2/6/2013.
(Judge's initials) (Date)